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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Reexamination of the Comparative )  
Standards for New Noncommercial )  
Educational Applicants )

MM Docket No. 95-31

To: The Commission

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COMMENTS OF  
MONTGOMERY CHRISTIAN EDUCATIONAL RADIO, INC.

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Date: May 15, 1995

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COMMENTS OF  
MONTGOMERY CHRISTIAN EDUCATIONAL RADIO, INC.

Montgomery Christian Educational Radio, Inc (hereafter "MCER"), by its undersigned counsel, hereby respectfully submits its Comments in connection with the above-captioned NOTICE OF PROPOSED RULEMAKING<sup>1</sup> (hereafter the "Notice") reexamining the comparative standards for mutually exclusive, noncommercial educational applications. MCER understands from the Notice that the Commission is seeking comments relating to possible modification of the criteria currently used to select among competing applicants for new noncommercial educational (hereafter "NCE") broadcast facilities, but not the standards applicable to resolving mutually exclusive applications filed against license renewal applications.<sup>2</sup> MCER's comments will suggest modifications to the present criteria for selecting among competing applicants that it believes will greatly help expedite the processing and final resolution of such applications.<sup>3</sup>

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1 FCC 95-79, released March 17, 1995.

2 Notice at footnote 1.

3 On March 1, 1993, MCER filed an application for a new, NCE FM station on 90.3 MHz at Dothan, Alabama. See FCC File BPED-930301MA. This application was the subject of the

## I. INTRODUCTION

1. MCER is the Commission licensee of noncommercial FM station WLBF, Montgomery, Alabama. MCER has an application pending before the Commission for a new, NCE FM application at Dothan, Alabama. This application is the subject of a subsequently filed, mutually exclusive NCE FM application on the same frequency at Dothan, Alabama by American Family Association. MCER has witnessed first hand the unbelievable inefficient manner in which NCE applications are processed by the Commission. MCER agrees with the basic premise of the Notice that the standards for deciding among mutually exclusive NCE applications need revision. MCER also agrees that some version of a "point system" would be the best basis on which to decide the respective merits of mutually exclusive applications for NCE stations.

## II. THE COMMISSION SHOULD SCRUTINIZE NCE APPLICATIONS TO ENSURE APPLICANTS POSSESS THE BASIC LEGAL QUALIFICATIONS TO HOLD A NONCOMMERCIAL LICENSE

2. MCER submits that, as an initial matter, the Commission can conserve its NCE application processing resources by requiring applicants for NCE spectrum to demonstrate that they possess the basic legal qualifications to hold a NCE license. Section 73.5034 of the Commission's rules provides that a

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subsequent filing of a mutually exclusive application by American Family Association. See FCC File BPED-930419MB. MCER has waited for over two (2) years for its application to be processed and designated for a comparative hearing. MCER hopes its comments will help the Commission fashion a NCE comparative hearing process that will result in a significantly more expeditious processing system for NCE applications.

447 C.F.R. 73.503.

noncommercial educational broadcast station will be licensed only to a non-profit educational organization. MCER believes that many applications for NCE spectrum are filed by individuals or groups that are not non-profit educational organizations. MCER further believes that the Commission would greatly diminish the filing of applications by unqualified applicants, and lessen the number of potential comparative hearing situations, by requiring applicants for NCE spectrum that are not current FCC NCE licensees to demonstrate their Section 501(c)(3) non-profit status under the rules and regulations of the Internal Revenue Service. The Commission can accomplish this by requiring applicants for NCE stations to file copies of their I.R.S. Section 501(c)(3) determination letters with their applications. Existing NCE licensees should be exempted from making this showing.

### III. INITIAL QUESTIONS FOR COMMENT FROM NOTICE

3. The Notice relies heavily on joint comments filed earlier in this proceeding by The Association of America's Public Television Stations and National Public Radio (hereafter "ACTS/NOR") and comments filed by the National Federation of Community Broadcasters (hereafter the "NFCB"). ACTS/NOR and NFCB proposed a number of suggested changes in the NCE comparative criteria. MCER does not believe that the suggestions of these commentators lay the predicate for a realistic and workable system for deciding on the comparative qualifications of mutually exclusive NCE applicants. Thus MCER has tendered its suggestions

on an appropriate criteria.

A. INITIAL QUESTIONS RAISED IN THE NOTICE

1. Generally, whether the existing NCE criteria should be retained and, if so, whether the "refinements" to the criteria proposed by ACTS/NOR are appropriate. Specifically, are certain of the ACTS/NOR proposals, including for example the proposals to favor applicants with objectives that are "directed outwardly to the ...listening community and not exclusively to the licensee itself" to favor applicants with a governing board that "is broadly representative of the community to be served" and to favor applicants who can demonstrate operating efficiencies through "common ownership" likely to unfairly disadvantage certain types of applicants and why?
2. Should the factors enumerated in (1) above and/or other factors ACTS/NOR proposed be eliminated or modified? Should the factors proposed by ACTS/NOR be weighted in the manner suggested? If factors in addition to those proposed by ACTS/NOR should be considered, what are they and how should they be weighted?
4. MCER submits that any subjective criteria as proposed by ACTS/NOR is inherently unworkable and unduly complicates the comparative hearing process. How can the Commission objectively ascertain whether an applicant's objectives are "directed outwardly to the ...listening community and not exclusively to the licensee itself" to a comparatively greater extent than another applicant? What hard evidence can an applicant proffer in the context of a comparative hearing to demonstrate its objectives are directed "outwardly to the ...listening community" to a greater extend than a competing applicant or applicants? MCER submits that such a factor is inherently not factually quantifiable in the context of a comparative hearing process.
5. Moreover, what does "broadly representative of the community to be served" mean? Is this intended to imply that an

applicant for a NCE station that will serve a community with a largely Hispanic population would be given a preference if its board members were also Hispanic? Or does "broadly representative" mean that the applicant's board is made up primarily of local representatives? MCER believes that the inherent vagueness of such a criteria renders it virtually unusable in a comparative hearing context. In fact, all of ACTS/NOR's comparative criteria listed above are just as vague and amorphous as the present "integrated into the overall operations and objectives" criteria for NCE comparative applications

3. Should a "point system" be adopted in place of the existing NCE comparative criteria as proposed by NFCB? If so, are NFCB'S proposed comparative factors both appropriate and comprehensive, and are the weights suggested by NFCB appropriate? If not, what factors should be considered and how much weight should be given to each factor. Additionally, what factor(s) should be employed as a "tiebreaker" and how should those factors be applied?

6. MCER believes that a "point system" is the only objective and factually quantifiable comparative means for deciding among two or more mutually exclusive applications for NCE spectrum. However, NFCB's comparative factors leave a great deal to be desired. NFCB proposes "spectrum efficiency" as a factor to be considered and weighted in favor of an applicant. However, Section 307(b) of the Communications Act of 1934, as amended,<sup>5</sup> requires the Commission to distribute licenses so "...as to provide a fair, efficient, and equitable distribution

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5 47 U.S.C.A. 307(b).

of radio service" to the United States. Thus, to the extent one applicant proposes a significantly more efficient use of NCE spectrum through superior coverage, it is entitled to a dispositive comparative finding under the Act, not just a "weighted" credit.<sup>6</sup>

7. With regard to "weighing" based on "minority control", the Commission should reject such an analysis based on its experience in comparative broadcast hearings for commercial FM allotments, and common sense. Unlike commercial broadcast licensees, NCE licensees are non-profit entities with boards that are made up of honorary or volunteer board members. These board members have no ownership interest or financial interest in the applicant or in the NCE station. They typically serve on an unpaid, volunteer basis. As a result, the make-up of the boards of such non-profit entities is constantly changing. Therefore, it is unrealistic for the Commission to give a preference to one applicant over another based on the characteristics of ephemeral board members.

8. Moreover, as the Commission has seen in the commercial comparative broadcast hearing sphere, preferences given to applicants based on race, sex, or other factors or characteristics merely result in "fronts" being placed in the applicant group to gain the corresponding comparative credit. As soon as the comparative hearing spotlight goes out, and the grant

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<sup>6</sup> See, Radio Cincinnati v. FCC, 177 F.2d 92 (U.S. App. D.C. 1949)

of the construction permit becomes "final", these comparative hearing "fronts" typically disappear since they are no longer of use to the applicant. Basing a long term NCE broadcast license on factors that are as changeable as the weather is sheer folly and defeats the Commission's mission statement of serving the public interest through the licensing of broadcast facilities.

9. Basing a comparative decision on program content, or the apparent code term found in the Notice of "local program origination", raises troubling constitutional questions. All programming by a NCE broadcast station emanates from a transmitter and antenna located somewhere in the local service area. This is a fact of broadcasting in the NCE spectrum. Therefore, the term "local program origination" must entail considerations of the content of the programming, i.e. whether or not it contains local information. The Commission would be poorly advised to make program content an issue in deciding among NCE applicants and should avoid allocating points based thereon.

10. A preference based on the local origin of the applicant would make a reasonable basis for comparative consideration. For example, a non-profit corporation organized under the laws of the state in which the community of license is located should be given preference over an applicant that is a foreign corporation. This is based on the fact it is reasonable to assume the local applicant will be better able to ascertain and address the local problems, needs and interest of the community of license.



11. Similarly, the finder's preference should be considered by the Commission. MCER believes that this factor should be given the greatest credit in noncommercial broadcast hearings. The reason for this is based on the manner in which applicants are required to prepare and file applications utilizing the "reserved" portion of the FM broadcast spectrum.

#### IV. THE MCER PREFERENCE POINT PROPOSAL

##### A. FINDER'S PREFERENCE

12. A party desiring to build and operate a new, noncommercial FM station has a greater burden to bear than its commercial FM counterpart. The Commission assigns commercial FM channels to communities through its FM Table Of Allotments.<sup>7</sup> Once a commercial FM channel is allocated to a community through the FM Table of Allotments, the Commission opens a "window" filing period and solicits the filing of applications to use that FM allotment in that community. Interested parties are made aware of the FM channel and the geographic coordinates that must be specified to utilize the allotment in the Report And Order assigning the channel to the specified community. Thus, the majority of the work involved in finding the channel and making it available for applications is undertaken by the Commission in connection with the rule making proceeding to add the channel allocation to the Table of Allotments. This is not the case with channels in the portion of the FM band reserved for noncommercial use.

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<sup>7</sup> See 47 C.F.R. 73.202.

13. NCE applicants are required to undertake extensive engineering work on their own to ascertain whether a frequency is available for use in their proposed community of license. There is no NCE Table of Allotments. Rather, an interested party must undertake the expensive and time consuming process of ascertaining whether a frequency is available for use through an extensive engineering analysis. At the time this process is begun by the party, there is no guarantee that a channel will be found to be available for use. As the NCE band has become more and more congested, potential applicants for new NCE channels typically find, after expending significant engineering fees and costs, that there are no NCE frequencies available for use in a proposed community of license. The search for NCE frequencies has more and more become a gamble, with the engineering "stakes" rising and the odds of finding a channel diminishing.

14. Those parties who are willing to invest in expensive engineering studies to find available NCE frequencies, and who are successful in their search, then incur the additional expense entailed in the preparation and FCC filing of an FCC Form 340 NCE construction permit application. At the point this application is filed with the Commission, a NCE applicant may easily have between \$7,500.00 and \$15,000.00 in legal, engineering and associated fees and expenses tied up in its application.

15. More significantly, at the point the application is accepted for filing by the Commission, the American public learns for the first time that the proposed NCE frequency can be

utilized for a new NCE broadcast station in the proposed community of license and serving the proposed service area. At present, the Commission then issues a Public Notice soliciting mutually exclusive applications and/or comments on the original application. Mutually exclusive applicants can draw upon the original applicant's hard work and expense and file competing applications. The original applicant finds that under the present comparative hearing process it receives no credit for its pioneering efforts in ascertaining the availability of the NCE channel. In fact, its pioneering efforts are ignored altogether in the comparative hearing process. This is inherently unfair and should be remedied under the new comparative standards for new NCE applications.

16. MCER believes that a finder's preference point should be given to the original applicant among mutually exclusive applications in a NCE comparative hearing. This point preference should be the largest amount allocated for any one factor. MCER believes that the allocation of this preference point to the original applicant is justified by two factors. First, it is equitable to reward the finder for its pioneering efforts in isolating the NCE frequency for use. Second, such a point preference encourages parties to undertake the necessary effort and expense to find frequencies and apply for new NCE stations, thereby increasing the number of NCE stations and adding to the diversity of NCE broadcast voices throughout the United States.

#### B. MERITORIOUS BROADCAST RECORD PREFERENCE POINT

17. Every year the Commission rescinds construction permits for new NCE stations due to the failure of the permittee/applicant to actually build the station for which it has been given a construction permit. Many well-intentioned NCE applicants find that building a new NCE broadcast station is significantly more difficult than they had anticipated and abandon the project.

18. On the other hand, there are NCE licensees with a long record of building the NCE stations for which they have been given construction permits. In many cases, these NCE licensees can demonstrate a long and meritorious record of broadcast service in connection with station operation. Such a record is the clearest indication possible that the applicant will, in all likelihood, provide a meritorious broadcast service on a new, NCE station. MCER believes that applicants for new NCE stations who can demonstrate a past record of meeting their public service mandate under the Communications Act of 1934, as amended, should be given a preferential point over an applicant with no prior NCE broadcast record, or one who cannot demonstrate such a meritorious past record of service. Moreover, MCER believes that this preference should be enhanced in the case of an applicant that can show the meritorious operation of another NCE station within the same state.

C. LOCAL-SAME STATE BOARD OF DIRECTORS PREFERENCE POINT

19. MCER supports the concept of a NCE comparative preference point being awarded to applicants who have governing board members who are either local to the proposed community of license or local to the state in which the NCE station will operate. Such local or state governing board membership helps the applicant remain aware of local problems, needs and interests and allows the applicant to better serve the community through its programming.

20. Under the MCER point system, NCE applicants would receive preference points for a finder's preference, meritorious past broadcast record and a governing board made up of local or state members. MCER encourages the Commission to adopt a NCE comparative hearing process that encompasses these suggestions. More importantly, MCER encourages the Commission to adopt a NCE comparative hearing process that will allow for a prompt resolution of NCE comparative hearing cases.

Respectfully submitted,  
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